Supreme Court, U.S.
FILED
SEP 19 2000
CLERK

No. 99-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

FREDERICK M. BARON
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
* *Counsel of Record*

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167
Attorneys for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

THE EXEMPTION IN SECTION 1 OF THE FEDERAL ARBITRATION ACT APPLIES, AT THE LEAST, TO EMPLOYEES OF FIRMS THAT ENGAGE IN THE PRODUCTION, TRANSPORTATION OR DISTRIBUTION OF GOODS OR SERVICES IN INTERSTATE MARKETS 4

I. THE PHRASE "ENGAGED IN COMMERCE" IS GENERALLY UNDERSTOOD TO ENCOMPASS THE PRODUCTION AND DISTRIBUTION AS WELL AS THE TRANSPORTATION OF GOODS OR SERVICES IN AN INTERSTATE MARKET 5

II. THE RULES OF STATUTORY CONSTRUCTION DO NOT WARRANT A NARROWER CONSTRUCTION OF SECTION 1 9

III. CONGRESS DID NOT INTEND THE FAA TO DEPRIVE A BROAD CATEGORY OF WORKERS OF THE RIGHT TO TRIAL BY JURY. 16

CONCLUSION 19

APPENDIX A
FEDERAL STATUTES LIMITED TO PERSONS ENGAGED IN COMMERCE ..... **App. 1**

APPENDIX B
FEDERAL STATUTES EXPRESSLY LIMITED TO INTERSTATE TRANSPORTATION OF PERSONS OR GOODS ..... **App. 3**

TABLE OF AUTHORITIES

CASES

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999)..... 10
Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)..... 10
Bailey v. Central Vermont Ry., 319 U.S. 350 (1943)..... 18
Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 252 U.S. 436 (1920)..... 11
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)..... 7
Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) 4, 11
Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952)..... 18
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958)..... 10
Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924)..... 7
Federal Trade Commission v. Curtis Pub. Co., 260 U.S. 568 (1923)..... 7
Federal Trade Commission v. Sinclair Refining Co, 261 U.S. 463 (1923)..... 3, 7
Garcia v. United States, 469 U.S. 70 (1984)..... 11
Gooch v. United States, 297 U.S. 125 (1936)..... 11
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974)..... 6
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)..... 3, 10, 11, 12, 16
Holder v. Hall, 512 U.S. 874 (1994)..... 10
Hughey v. United States, 495 U.S. 411 (1990)..... 10, 11
Illinois Cent. R.R. Co. v. Behrens, 233 U.S. 473 (1914)..... 9
King v. United States, 379 U.S. 329 (1964) 10
Mondou v. New York, N. H. & H. R.R. Co., 223 U.S. 1 (1912)..... 17
Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117 (1991)..... 10, 12

P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994).....10
Peretz v. United States, 501 U.S. 923 (1991).....10
Shanks v. Del. Lackawanna, & W.R.R. Co., 239 U.S. 556 (1916).....9
Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)....6
United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922).....7
United States v. Alpers, 338 U.S. 680 (1950).....10, 11
United States v. American Bldg. Maint. Industries, 422 U.S. 271 (1975) 3, 6
United States v. District Court, 401 U.S. 520 (1971).....10
United States v. Feola, 420 U.S. 671 (1975).....10
United States v. Powell, 423 U.S. 87 (1975).....11
United States v. Robertson, 514 U.S. 669 (1995).....6
United States v. Standard Oil, 384 U.S. 224 (1966).....10
United States v. Turkette, 452 U.S. 576 (1981).....10, 11
United States v. Wells, 519 U.S. 482 (1997) 10
United States v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964).....10
West v. Gibson, 527 U.S. 212 (1999).....10

STATUTES

9 U.S.C. § 1 (Federal Arbitration Act) .....passim
15 U.S.C. §§13-18a (Clayton Act).....5, 6, 7
15 U.S.C. §§13-27 (Robinson-Patman Act).....5, 6
15 U.S.C. §1127 (Lanham Act) 6
15 U.S.C.A. § 41 et seq. (Federal Trade Commission Act).....7
45 U.S.C. § 51 et seq., 35 Stat. 65 (FELA) 8, 9, 17
17 Stat. 262, 267 § 24 17
38 Stat. 103, 105 § 4(5) 17

OTHER AUTHORITIES

N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION (6th ed. 2000).....16

IN THE

Supreme Court of the United States

No. 99-1379

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent individual plaintiffs in civil actions, including employees seeking to vindicate their rights against discrimination in the workplace under federal and state civil rights statutes.

In ATLA's view, arbitration of existing claims may offer an effective and efficient means of dispute resolution for both employee and employer. Such post-dispute agreements to arbitrate depend upon a knowing and voluntary waiver of the right of access to the courts and the right to a trial by jury.

By demanding as a condition of employment that the employee prospectively waive these rights prior to any dispute, however, employers undermine both the constitutional and statutory rights of employees. The plain text of the Federal Arbitration Act indicates that Congress did not intend such a result.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit can be affirmed on a ground substantially narrower than that relied on by the court of appeals. It is not necessary in this case to decide whether the exemption in section 1 of the Federal Arbitration Act applies to *all* employees. At the least the phrase "engaged in . . . interstate commerce" is as broad as its usual meaning, which encompasses the entire stream of interstate commerce, from the production of goods and services for that commerce through their final distribution.

The phrase "engaged in commerce" is used in a large number of federal statutes, and has been consistently interpreted to include the stream of interstate commerce from initial production through distribution. The Clayton Act, originally adopted in 1914 and expressly limited to firms engaged in commerce, has long been construed to apply to "the flow of interstate commerce -- the practical, economic

continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *United States v. American Bldg. Maint. Industries*, 422 U.S. 271, 276 (1975). Prior to the 1925 enactment of the Federal Arbitration Act, this Court had repeatedly applied the Clayton Act to defendants which were not part of the transportation industry. *E.g. Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463 (1923).

The principle of ejusdem generis is only invoked to clarify the meaning of ambiguous language. Petitioner itself describes the phrase "engaged in commerce", when used in the Robinson-Patman Act, as "clear language."

Under ejusdem generis, if an enumeration is followed by a general term, the only limitation which can be imposed on the general term is some characteristic common to *all* of the items mentioned in the enumeration. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). Petitioner urges that "workers engaged in . . . commerce" should be limited to workers who move goods between states, or to workers in a transportation industry. But many seamen and railroad employees would not meet that requirement. Seamen on fishing boats, for example, are not in a transportation industry and do not usually move goods from one state to another; rather, they engage in interstate commerce by generating goods that are later sold in an interstate market.

Petitioner Circuit City, a large national retailer of electronics goods, is clearly "engaged in commerce" within the meaning of the Clayton Act. The section 1 exemption of the FAA extends to the "class" of all employees who work for such an employer.

ARGUMENT

THE EXEMPTION IN SECTION 1 OF THE FEDERAL ARBITRATION ACT APPLIES, AT THE LEAST, TO EMPLOYEES OF FIRMS THAT ENGAGE IN THE PRODUCTION, TRANSPORTATION OR DISTRIBUTION OF GOODS OR SERVICES IN INTERSTATE MARKETS

Both the Ninth Circuit and petitioner misapprehend the nature of the question posed by this case, and by the terms of section 1 of the Federal Arbitration Act. In the court of appeals' seminal decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999), it expressly assumed that the phrase "workers engaged in foreign or interstate commerce" could only have one of two possible meanings. That statutory limitation, it asserted, either must include all employees or must be narrowly limited to only those employees "who actually transport people or goods in interstate commerce." 177 F.3d at 1085. Petitioner also insists that these are the only two possible interpretations of section 1. (Pet. Br. 22, 24).

There is, however, a third possibility -- that the phrase "engaged in commerce" has its normal meaning, and encompasses the production and distribution -- as well as the transportation -- of any goods or services that pass through interstate commerce. If the phrase has at least that scope, that is sufficient to resolve the instant case.[2]

[2] Such a resolution of the instant case would leave unresolved the question of whether the section 1 exemption also applies to employees of employers whose businesses merely affect interstate commerce.

I. THE PHRASE "ENGAGED IN COMMERCE" IS GENERALLY UNDERSTOOD TO ENCOMPASS THE PRODUCTION AND DISTRIBUTION AS WELL AS THE TRANSPORTATION OF GOODS OR SERVICES IN AN INTERSTATE MARKET

The exemption in section 1 of the Federal Arbitration Act applies to any "class of workers engaged in foreign or interstate commerce." The phrase "engaged in commerce" is a common one in federal statutes; several dozen other federal laws, some of which had been enacted prior to the Federal Arbitration Act in 1925, use identical language. See Appendix A. There are hundreds of federal statutes using the phrase "in commerce", including a number of criminal provisions.[3] Neither "engaged in commerce" nor "in commerce" has been generally understood, in these other federal statutes, to be limited to the physical movement of goods or people in interstate commerce; to the contrary, these laws have been construed to apply to the entire stream of commerce, from the production of goods or services which pass though interstate channels until their distribution. Section 1 should be interpreted at least that broadly.

The two most frequently applied statutes regarding persons "engaged in commerce" are the Clayton Act, first enacted in 1914, and the Robinson-Patman Act of 1936. Both statutes forbid a number of actual or potentially anti-competitive practices, and both are limited in their application to firms "engaged in" commerce. 15 U.S.C. §§13-18a (Clayton Act); 15 U.S.C. §§13-27 (Robinson-Patman Act). Both statutes have uniformly been understood to apply to any firm engaged in interstate transactions, not merely to those companies which are involved in the actual transportation of goods or people.

[3] Petitioner correctly notes that the phrases "engaged in commerce" and "in commerce" have generally been given the same construction. (Pet. Br. 14, 15 n.6).

In *United States v. American Bldg. Maint. Industries*, 422 U.S. 271 (1975), this Court reiterated the long established understanding that the Clayton Act applies to "the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution *to the consumer*." 422 U.S. at 276 *quoting Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)(Emphasis added). The actual interstate transportation of goods is only a small portion of the range of activities covered by the Clayton Act. Among the numerous applications of the Act by this Court and lower courts, the amount of litigation by or against transportation companies is insignificant.

The Robinson-Patman Act, also limited to businesses engaged in commerce, has been construed in the same manner. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 195. Petitioner itself describes *Gulf Oil* as reflecting "four decades of near-uniform appellate law reading 'engaged in commerce'" and as reiterating a construction that was "according to its ordinary . . . meaning." (Pet. Br. 31.)

This Court has applied other similarly phrased statutes in the same manner. The Lanham Act was expressly adopted "to protect persons engaged in commerce against unfair competition." 15 U.S.C. §1127. This Court applied that statute to a trade dress dispute between competing Texas fast food restaurant chains in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). Similarly, in *United States v. Robertson*, 514 U.S. 669 (1995), the Court concluded that the defendant had "engaged in commerce," and thus was subject to the prohibitions of RICO, because he had purchased equipment for a mine from out of state sources. 514 U.S. at 671.

In 1925, when the Federal Arbitration Act was adopted, this interpretation of "engaged in commerce" was so well established that its routine application drew little comment. Prior to that year this Court had applied to firms that engaged in interstate sales (but did not operate interstate

transportation systems) both the Clayton Act and a provision of the Federal Trade Commission Act authorizing investigations of firms "engaged in commerce." *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924)(Federal Trade Commission Act); *Federal Trade Commission v. Sinclair Refining Co*, 261 U.S. 463 (1923)(Clayton Act); *Federal Trade Commission v. Curtis Pub. Co.*, 260 U.S. 568 (1923)(Clayton Act); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922)(Clayton Act).

The other federal laws whose application is limited to persons engaged in commerce cover a wide range of subjects, including securities, credit practices, electronic funds transfers, gifts to federal officials, transfers of energy technology, and limitations on foreign acquisitions of American firms. See Appendix A. The variety of the hundreds of federal statutes regarding firms or actions "in commerce" is virtually unlimited. Petitioner does not seriously suggest that all, or any, of these laws have been, or should now be, interpreted to apply only to the actual operation between states of trains, airplanes, trucks and boats.

This Court has generally used the phrase "engaged in commerce" in this manner. For example, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997), the Court observed, "Even though petitioner's camp does not make a profit, it unquestionably engaged in commerce, not only as a purchaser, . . . but also as a provider of goods and services." 520 U.S. at 573.

Had Congress wanted to limit the exemption in section 1 of the FAA to employees of transportation firms, it certainly would have done so specifically. As we set out in Appendix B, Congress has expressly framed a large number of statutes to apply only to interstate "transportation" or only to "common carriers" engaged in commerce. Respondent urges that section 1 be construed as if it read "workers engaged in interstate transportation" or "employees of common carriers engaged in

interstate commerce." But Congress, which has repeatedly utilized just such terminology, deliberately chose not to do so here.

Petitioner relies on a series of pre-1925 decisions of this Court which limited the application of the Federal Employers Liability Act to employees whose interstate activities involved the transportation of goods and people. (Pet. Br. 18). Petitioner suggests that the limitation of the FELA to transportation activities grew out of an interpretation of the phrase "engaged in commerce" in the FELA. (Pet. Br. 18, 21). That is clearly incorrect. The FELA contained an express limitation that confined its reach to transportation; it applied only to "common carrier[s] by railroad." 35 Stat. 65. The FELA was inapplicable to other types of interstate commercial activity because of this restrictive language, not because this Court believed that "engaged in interstate commerce" *meant* "engaged in interstate transportation." This Court's pre-1925 application of the Clayton Act makes clear its understanding, and that of Congress, that the phrase "engaged in commerce" was not limited in this manner.

Petitioner Circuit City is unquestionably engaged in commerce. It operates 518 stores throughout the United States, and sells goods directly on its website. (www.circuitcity.com). Circuit City buys from manufacturers and wholesalers throughout the nation, and certainly receives and distributes most of its goods across state lines. Many of the electronic items sold by petitioner were undoubtedly manufactured, in whole or in part, in foreign countries. In any one state, even California, only a small fraction of the goods sold by a given store will have been made within that state. There is no question that Circuit City itself would, for these reasons, be subject, for example, to the provisions of the Clayton Act, the Robinson-Patman Act, and other laws applicable only to firms engaged in interstate commerce.

Employees of a firm engaged in interstate commerce are ipso facto within the scope of the exemption in section 1 of

the FAA. The statute neither authorizes nor contemplates individualized evaluations of the particular duties of each specific worker. In this regard it differs sharply, and deliberately, from the FELA, which applied to a railroad worker only "*while* he is employed by such carrier in such commerce." 35 Stat. 65 (Emphasis added). Under the FELA, coverage of an employee could literally vary from moment to moment, depending on what task a worker was doing. *E.g. Shanks v. Del. Lackawanna, & W.R.R. Co.*, 239 U.S. 556, 558 (1916); *Illinois Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 478 (1914). Section 1 of the FAA, on the other hand, turns neither on a worker's tasks at any point in time, nor on an individualized assessment of the overall duties of the particular worker in question. Rather, the statutory test is whether the "*class* of workers" to which an employee belongs engages in commerce. The first illustration provided by the statute of a "class of workers" is "railroad employees", a phrase that would encompass *all* the employees of a railroad engaged in commerce. Similarly, where any other employer is engaged in commerce, as that phrase is generally understood, all of its workers fall within the scope of the section 1 exemption.

II. THE RULES OF STATUTORY CONSTRUCTION DO NOT WARRANT A NARROWER CONSTRUCTION OF SECTION 1

Petitioner expressly insists, as it must, that the section 1 exemption does *not* apply to "all workers 'engaged in interstate or foreign commerce'." (Pet. Br. 23). It contends, rather, that rules of statutory construction compel the conclusion that Congress actually meant to depart from the normal meaning of "engaged in commerce" and to exclude from the exemption the vast majority of workers engaged in interstate commerce. No principles of interpretation, however, require such an extraordinary limitation.

Petitioner's argument misapprehends the scope and force of the ejusdem generis doctrine. Petitioner believes that in *every* case in which a general term is preceded by a more specific list, the list *must* be deemed to contain a covert limitation of some sort, and that the general term can *never* be given its ordinary meaning. (Pet. Br. 8, 23 n. 11). That is not the law.

This Court has never applied ejusdem generis in this extreme or mechanical manner. To the contrary, since 1950 this Court has in fact rejected arguments based on ejusdem generis in virtually very case in which they have been raised.[4]

---

[4] *West v. Gibson*, 527 U.S. 212, 225 (1999) (ejusdem generis invoked in dissenting opinion); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 408 (1999) (ejusdem generis invoked in dissenting opinion); *United States v. Wells*, 519 U.S. 482, 490 n.9 (1997) (ejusdem generis argument rejected in majority opinion); *id.* at 512 (ejusdem generis invoked in dissenting opinion); *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 720 (1995) (ejusdem generis invoked in dissenting opinion); *Holder v. Hall*, 512 U.S. 874, 917 (1994) (ejusdem generis invoked in concurring opinion regarding an interpretation of the statute not accepted by majority); *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 727-28 (1994) (ejusdem generis invoked in dissenting opinion); *Peretz v. United States*, 501 U.S. 923, 955 (1991) (ejusdem generis invoked in dissenting opinion); *Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) (ejusdem generis argument rejected by majority opinion); *id.* at 136 (ejusdem generis invoked by dissenting opinion); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *United States v. Powell*, 423 U.S. 87, 91 (1975); *United States v. Feola*, 420 U.S. 671, 708 (1975) (dissenting opinion); *United States v. District Court*, 401 U.S. 520, 524 (1971); *United States v. Standard Oil*, 384 U.S. 224, 228 (1966); *King v. United States*, 379 U.S. 329, 336-37 (1964); *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 88 (1964); *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 495 n. 15 (1958); *United States v. Alpers*, 338 U.S. 680, 683 (1950).

The only decision of this Court in the last fifty years which relied on ejusdem generis to limit the meaning of a general term appears to be *Hughey v. United States*, 495 U.S. 411, 418 (1990).

This Court's decisions recognize that when Congress uses a general term preceded by a more specific list, it often means to do no more than recite common or important examples of the types of things which were indeed within the ordinary meaning of that general term.

This Court has repeatedly held that ejusdem generis cannot be invoked unless the general term at issue is inherently ambiguous. "The rule of *ejusdem generis* . . . is only an instrumentality for ascertaining the correct meaning of a word when there is uncertainty." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980), quoting *United States v. Powell*, 423 U.S. 87, 91 (1975), quoting *Gooch v. United States*, 297 U.S. 125, 128 (1936).[5] In *Hughey v. United States*, 495 U.S. 411, 417 (1990), one of the few actual applications of ejusdem generis, the statute in question authorized consideration in restitution orders of certain specified considerations and "such other factors as the court deems appropriate."[6] Petitioner does not suggest that the phrase "engaged in commerce" is inherently ambiguous.[7] To the contrary, petitioner describes

---

[5] *Garcia v. United States*, 469 U.S. 70, 74 (1984); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *United States v. Alpers*, 338 U.S. 680, 683 (1950).

[6] Petitioner cites as the paradigm of a case calling for application of ejusdem generis an enumeration followed by the phrase "and other things." (Pet. Br. 20 n. 10).

[7] Quite arguably the phrase may be ambiguous in the sense that it may refer to *more* than just the production, movement, and distribution of goods in interstate commerce. *Craft v. Campbell Soup Co.*, 177 F. 3d 1083, 1085 (9th Cir. 1999). In the era when the Federal Arbitration Act was adopted, even this Court used the phrase "engaged in commerce" as if it were the same as involving or affecting commerce. E.g. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436 (1920). But the possibility that "engaged in commerce" might have such a broader meaning cannot justify utilizing ejusdem generis to give the phrase a narrower meaning.

the phrase "engaged in interstate commerce", when utilized in the Robinson-Patman Act, as "clear language." (Pet. Br. 31). If it were indeed unclear whether "engaged in commerce" or "in commerce" referred to anything other than the actual transportation of goods and people between states, that would raise serious constitutional problems for the numerous criminal provisions that utilize those phrases.

This Court has also observed that the use of ejusdem generis is particularly inappropriate where the general term in question is preceded by the adjective "any". In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), this Court rejected the contention that "any other final action" by an agency referred only to final action after notice and an opportunity for a hearing.

> When Congress amended the provision in 1977, it expanded its ambit to include not only "other final action," but "*any* other final action." This expansive language offers no indication that Congress intended the limiting construction . . . that the respondents now urge.

Harrison v. PPG Industries, Inc., 446 at 588-89 (Emphasis in original). The exemption in section 1 of the FAA applies to "*any* other class of workers engaged in foreign or interstate commerce." (Emphasis added). *See Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991)(general phrase referring to "*all* other law" (emphasis added) "means what it says.")

Any application of ejusdem generis must, at the least, meet one essential requirement--any restriction deemed to derive from the enumeration must, of course, be satisfied by every item in the enumeration itself. As petitioner itself recognizes, the limitation has to be some element "common" to every situation encompassed by the enumeration. In

Harrison v. PPG Industries, Inc., for example, the respondent sought to read into the general phrase "final action" a requirement that that action have been preceded by notice and an opportunity for a hearing. In rejecting that contention, this Court explained:

> The flaw in this argument is that at least one of the specifically enumerated provisions . . . does not require the Administrator to act only after notice and opportunity for hearing. . . . Thus, even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" . . .

446 U.S. at 589.

Petitioner offers two formulations of the restriction which it seeks to draw from the enumeration in section 1 of the FAA -- (1) persons "who are actually engaged in the movement of goods in interstate commerce" (Pet. Br. 21), or (2) workers "involved in a transportation industry." (Pet. Br. 24). There are, however, numerous instances in which employees within the enumeration--seamen and railroad employees--would not satisfy one or both of the proposed alternative tests.

There are several categories of seamen who fall outside both proposed limitations. The most obvious is seamen on fishing boats. These boats do not ordinarily travel between states; they leave a home port, catch fish in inland waters or on the high seas, and then return to the state where they originated. Fishing is obviously not a transportation industry. Yet most of these enterprises are engaged in commerce, because they are catching fish to be sold in an interstate market. Seamen on these boats are like workers in a mine or a car factory. Similarly, there are seamen who work on exploration activities for oil companies who would not meet

either of petitioner's proposed standards.[8] Many of these seamen are members of the Seafarers International Union, the original proponent of the section 1 exemption. There are some railroad workers who would not meet either proposed standard.[9]

A requirement that workers actually move goods or people between states would delineate a factor not common to additional railroad employees. Most employees of interstate railroads engage in commerce without ever personally moving goods or people; some purchase (or resell) in interstate markets fuel or rolling stock (which may or may not be used in the railroad's interstate activities), manage the railroad's funds or other investments, sell coal from the company's mines, purchase in interstate markets items, such as food, for resale to (interstate or intrastate) travelers, or license the name of the railroad for use on toys or other items. Similarly, purely intrastate railroads engage in commerce by doing many of these same things. Thus the Long Island Railroad engages in interstate commerce when it she buys diesel fuel from a New Jersey refinery, or purchases from the Hershey Company in Pennsylvania candy to be resold to commuters.

Similarly, the proposed alternative requirement of involvement in "the transportation industry" would exclude still more seamen. Many oil companies own their own fleets of tankers; some mining companies operate their own ships

---

[8] Seamen run the boats which explore for offshore oil and that service offshore drilling platforms. Some offshore drilling, especially in deep waters, is done from boats rather than platforms anchored on the seabed.

[9] Some logging companies have built their own intrastate railroads to move timber from logging areas to the company's mills. A number of mining companies built and operate rail lines to move coal or other minerals from a mine head to a processing plant. These activities are in interstate commerce because they produce goods for sale in interstate markets.

and barges to move minerals, particularly on the Great Lakes. The seamen involved are in the oil or mining industries, not the transportation industry. "Engaged in commerce" cannot be subject to a limitation that would not reach, for example, the captain and crew of the Exxon Valdez. And a requirement of involvement in the transportation industry would exclude some workers who do in fact move goods across state lines, the driver of a HomeGrocer.com or Hecht Company truck making a delivery from Washington, D.C., to the Maryland suburbs, a diamond merchant bringing jewels from New York to California, or a courier delivering securities or a work of art.

The rule proposed by petitioner would have any number of strange consequences. If a consumer ordered over the internet food that came from an out-of-state source, the truck driver who delivered it would be within the exemption if he or she worked for Federal Express, but not if he or she worked for HomeGrocer.com. A worker who sold coal in interstate commerce would be covered if employed by a railroad, but not if by a coal company. If an Amtrak employee in Pennsylvania bought diesel fuel from an Exxon employee in Texas or electricity from Consolidated Edison employee in New York, the buyer's agent would be a "worker engaged in interstate commerce" but the sellers' agents would not.

The mechanical manner in which petitioner seeks to apply ejusdem generis is inconsistent with the methodology appropriate to that method of construction. When a general term is preceded by an enumeration, application of ejusdem generis requires considerable care in determining the characteristic common to the items on the list with which the legislature was concerned.

> The doctrine of ejusdem generis calls for more than merely an abstract exercise in semantics and formal logic. . . . The problem is to determine what unmentioned particulars are sufficiently like those mentioned to be made subject to the act's provisions by force of the

> general reference. In most instances there is a wide range of ways in which classes could be defined, any one of which would embrace all of the members in an enumeration. Germaneness to the subject and purpose of the statute, viewed in terms of legislative intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given effect.

2A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION §47.18, p. 289 (6th ed. 2000). Far from articulating any coherent purpose that would be served by exempting from the FAA only workers who moved goods, or only workers in transportation industries, but not other employees of firms engaged in commerce, petitioner expressly disavows any explanation. (Pet. Br. 26)("Conjecture abounds").

III. CONGRESS DID NOT INTEND THE FAA TO DEPRIVE A BROAD CATEGORY OF WORKERS OF THE RIGHT TO TRIAL BY JURY.

Petitioner suggests that Congress may have chosen to exempt railroad workers and seamen because "federal legislation already provided for arbitration of [their] grievances . . . , so that additional coverage by the FAA would be redundant." (Pet. Br. 26). The actual terms of that pre-FAA legislation, however, instead support a very broad interpretation of the exemption.

The critical change in the law worked by the FAA, where it applied, was to render enforceable an agreement to arbitrate *future* controversies that had not yet arisen between the parties. Section 2 applies to "[a] written provision in any . . . contract . . . to settle by arbitration a controversy *thereafter* arising out of such contract" (emphasis added), as well as to agreements to arbitrate existing disputes. Pre-FAA federal legislation regarding railroad workers and seamen, on the other

hand, was expressly limited to *post*-controversy agreements to arbitrate existing disputes.[10] Federal statutes had repeatedly forbidden employers from making or enforcing contracts with their workers that purported to limit in advance their ability to seek redress in the courts.[11]

This pre-FAA legislation evinces three congressional concerns. First, while providing to seamen and railroad employees the option of taking any known, existing controversy to arbitration, rather than to court, these laws sought to preserve and protect access to courts for workers who did not want to arbitrate a particular dispute. Second, Congress recognized the ability of employers to dictate contract terms to existing or prospective employees, and was determined not to permit the abuse of that power to strip workers of legally established remedies. Third, in the case of the FELA itself, under which employees had a constitutional and statutory right to a jury trial, these limitations protected workers from coercive employer action designed to shift a dispute to a forum less favorable to the worker than juries might be.

Petitioner's bare speculation that Congress singled out railroad employees as examples of an existing arbitration scheme is dubious. As this Court has repeatedly stated, the

---

[10] 17 Stat. 262, 267 § 24 (arbitration by shipping-commissioner limited to a specific question agreed upon by seaman and employer); 38 Stat. 103, 105 § 4(5) (agreement to arbitrate must "state specifically the questions to be submitted . . . for decision.") Only an agreement to arbitrate reached after a dispute had arisen could spell out in the required manner the specific question which the arbitrator was to decide.

[11] E.g. 45 U.S.C. § 55 (FELA) ("Any contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."), originally enacted as Act of Apr. 22, 1908, §5, 35 Stat. 65, and upheld as constitutional in *Mondou v. New York, N. H. & H. R.R. Co.*, 223 U.S. 1 (1912).

core of the protections given to railroad workers by the FELA is the right to trial by jury in both state and federal court:

> The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943)(citation omitted).

In *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952), for example, the Ohio court had set aside a plaintiff's jury verdict, enforcing a release which the injured worker had signed at the railroad's behest. This Court reversed, holding that the state court was required by, the FELA to submit all factual issues, including the validity of the release, to the jury. The Court emphasized that "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.* at 363.

In exempting from the FAA not only seamen and railroad employees, but also other workers engaged in commerce, Congress intended to assure that the FAA could not be used to inflict on millions of American workers the very abuses from which Congress had earlier acted to protect railroad employees and seamen.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

Attorneys for Amicus Curiae

September 19, 2000

APPENDIX A

FEDERAL STATUTES LIMITED TO PERSONS ENGAGED IN COMMERCE

7 U.S.C. § 511a (regulation of tobacco producers engaged in commerce)

13 U.S.C. § 303 (Secretary of the Treasury to collect certain information on persons engaged in foreign commerce)

15 U.S.C. §§ 13, 13a, 14, 18, 18a (Clayton Act prohibitions regarding businesses engaged in commerce; Robinson-Patman Act)

15 U.S.C. § 26a(a) (forbidding restraint of trade in gasahol by persons engaged in commerce)

15 U.S.C. § 291 (prohibition against use of phrase "United States assay" on gold by firms engaged in commerce)

15 U.S.C. § 78l(g) (securities law applies to an issuer engaged in interstate commerce)

15 U.S.C. §§ 79l(g), 79(m) (regulation of public utility companies engaged in interstate commerce)

15 U.S.C. §§ 1221(b), 1222 (regulating relations between franchisees or dealers and manufacturers engaged in commerce)

15 U.S.C. §§ 1607(c), 1679h(b)(A), 1681s(a)(1), 1691c(c), 1692l(a) (regulation of credit practices by persons engaged in commerce)

15 U.S.C. § 1693o(c) (regulation of electronic funds transfers by persons engaged in commerce)

18 U.S.C. § 662 (prohibition against acceptance by agricultural inspector of a gift from an agent of a firm engaged in commerce)

18 U.S.C. § 1962 (RICO barring use of racketeering proceeds by enterprise engaged in interstate commerce)

29 U.S.C. § 207(a) (maximum hours for employees engaged in commerce)

42 U.S.C. § 6276 (information regarding energy technology to be provided to persons engaged in commerce)

42 U.S.C. § 6391 (federal agencies to seek to prevent foreign nations from discrimination against U.S. citizens "engaged in commerce" abroad)

50 U.S.C. App. § 2170 (restrictions on takeover of persons engaged in interstate commerce where contrary to national security)

50 U.S.C. § 2170a(a) (prohibition against takeover of company engaged in interstate commerce which has a contract with the Department of Defense)

APPENDIX B

FEDERAL STATUTES EXPRESSLY LIMITED TO INTERSTATE TRANSPORTATION OF PERSONS OR GOODS

7 U.S.C. §§ 1561, 1571, 1572, 1573 (interstate transportation of seeds)

7 U.S.C. §§ 2131(2), 2132 (i), 2134, 2143, 2145 (interstate transportation of animals)

15 U.S.C. §§ 261, 262 (observation of time zones by carriers engaged in interstate or foreign commerce)

15 U.S.C. §§ 715b, 717, 717f, 717y (interstate transportation of certain petroleum)

15 U.S.C. § 1271 (transportation of hazardous materials by carriers engaged in interstate commerce)

18 U.S.C. § 33(a) (explosives in cars, etc. engaged in interstate commerce)

18 U.S.C. § 231 (interstate transportation of explosives)

18 U.S.C. § 660 (embezzlement or theft from persons engaged in commerce as a common carrier)

21 U.S.C. § 373 (carriers engaged in interstate commerce)

21 U.S.C. §§ 458(a), 460(a), 464(c)(1) (interstate transportation of poultry)

21 U.S.C. § 373 (records to be kept by carriers engaged in interstate commerce)

21 U.S.C. § 464(c)(i) (regulation of poultry products transported in interstate commerce)

21 U.S.C. § 610(c) (prohibition against interstate transportation of certain adulterated food)

21 U.S.C. §§ 619, 623 (interstate transportation of carcasses)

21 U.S.C. §§ 641, 644 (interstate transportation of certain meat)

21 U.S.C. §§ 1037, 1039 (interstate transportation of eggs)

33 U.S.C. §§ 1321(a)(2), 1322(a)(2), 2701(29) (pollution regulations regarding a vessel engaged in interstate commerce)

38 U.S.C. § 3672(c)(2) (training programs by carriers engaged in interstate commerce)

42 U.S.C. § 4916 (regulation of noise by carriers engaged in interstate commerce)

42 U.S.C. § 4917 (regulation of noise levels of motor carriers engaged in interstate commerce)

42 U.S.C. § 8441(f)(3) (regulation of persons engaged in interstate transportation of natural gas)

42 U.S.C. § 6939d(c)(1) (exemption regarding certain hazardous wastes for public vessels not applicable to a vessel engaged in commerce)

43 U.S.C. § 1862 (authority of FERC to regulate interstate transportation of natural gas)

45 U.S.C. § 181 (regulation of air carriers engaged in interstate or foreign commerce)

45 U.S.C. § 1104(6) (definition of rail carrier)

45 U.S.C. § 1207 (Alaska Railroad designated rail carrier engaged in interstate or foreign commerce)

46 U.S.C. § 8503(a)(1) (pilots on vessel engaged in interstate or foreign commerce)

46 U.S.C. App. §§ 354, 355 (passports or persons on and papers of vessels engaged in interstate or foreign commerce)

46 U.S.C. App. § 1121(h) (authority to investigate aircraft engaged in interstate or foreign commerce)

49 U.S.C. §§ 5102(9), 5109(f), 5110(a) (interstate transportation of hazardous materials)

49 U.S.C. § 14502 (entities protected against tax discrimination by states)

49 U.S.C. § 14505(3) (limitation on state taxes)

49 U.S.C. § 80504 (eligibility for Presidential medal of honor)

49 U.S.C. §§ 20104(c), 20109(a), 20109(b)(1) (safety on rail carrier engaged in interstate or foreign commerce)

50 U.S.C. App. § 2017(a)(d)(1) (war claims relating to death of persons on vessels engaged in commerce on the high seas)